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BANK PEMBANGUNAN MALAYSIA BHD

v.

SASACOM SDN BHD & ANOTHER CASE

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HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[SUIT NO: 22-80-2008-II]
25 OCTOBER 2010

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BANKING: *Banker and customer - Mortgage of ship - Borrower defaulted in loan repayments - Admiralty action by bank to arrest and sell ship - Ship sank after arrest but before sale - Vessel in defendant's custody - Whether plaintiff had sole obligation in contract or tort to preserve and maintain vessel - Whether obligation attached to both plaintiff and defendant*

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The plaintiff, Bank Pembangunan Malaysia Berhad, took over the rights and interests of Bank Industri & Teknologi Malaysia Berhad ('the bank') pursuant to a vesting order. One of such rights was the liability of a company named Sasacom Sdn Bhd ('Sasacom'), an owner and builder of ships. The bank had granted a RM9m term loan to Sasacom secured

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inter alia by a first preferred mortgage over one of the latter's vessels 'Sasacom I' (the vessel). On Sasacom's failure to remedy its default in repayments under the loan, the bank filed an admiralty action to seize and sell the vessel. The vessel was arrested but before it could be sold, it sank.

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Prior to the filing of the admiralty action, the bank had granted Sasacom a revolving bridging loan for a maximum principal sum of RM14m to part-finance the construction of six patrol boats by Sasacom for an Iraqi company ('Nasco'). Repayment of that loan was to be by way of progressive payments from the sale of the boats. The loan was secured

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by two assignment agreements whereby both the payments for construction of the boats as well as proceeds from the eventual sale of the boats were assigned to the bank. As the revolving bridging loan was repayable on demand, the bank, on default by Sasacom, made a demand and when it was not met, filed a civil action to recover the total amount

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owing with interest and costs.

The crux of Sasacom's defence in both the admiralty action and the civil suit was that the plaintiff failed to show proper accounting of the sum claimed in both cases and that its statements of accounts produced at the trial were unreliable. Sasacom said the bank failed to take into

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account the payments which were assigned to them under the assignment agreements. It alleged the bank had been overpaid by RM6,116,714.58 and Sasacom counterclaimed for this amount and for damages for loss of use of the sunken vessel.

Held (granting judgment in the admiralty action and in the civil suit; dismissing defendant's counterclaim):

(1) The defendant was not able to show any documentary evidence that it had objected to the correctness of the plaintiff's accounts. To challenge the accuracy of the accounts was its right but to keep silent for so long and then quibble about them in righteous indignation at the trial was not genuine conduct. (para 21)

(2) The defendant's allegation that there was full and/or overpayment of the two loans had not been substantiated. The alleged overpayments were not minute amounts. They were in the millions and it defied logic and common sense that the defendant would keep quiet about it until they were sued. That attitude, in itself, rendered the defence more of an afterthought than a genuine one. (paras 37 & 38)

(3) After its arrest, the vessel remained in the defendant's custody, right down to the time of its sinking. There was no obligation in contract or tort for the plaintiff to maintain the vessel. The legal obligation to maintain the vessel rested not solely with the plaintiff but with others interested in the vessel. It was a joint obligation, not exclusive to the plaintiff only. (paras 53 & 58)

(4) The defendant was not restrained from, nor helpless, in taking action to preserve and maintain the vessel. Since in law the obligation to maintain rested not solely with the plaintiff, and more importantly, the vessel not being in their physical custody, the blame for its sinking could not be assigned to the plaintiff. (para 59)

Case(s) referred to:

The Nagasaki Spirit; Owners of Cargo Lately Laden on Board the Ship or Vessel Ocean Blessing v. Owners of the Ship or Vessel Nagasaki Spirit [1994] 2 SLR 621 ***(refd)***

The Evangelismos [1858] 12 Moo PC 352 ***(refd)***

Kertih Port Sdn Bhd v. Pemunya Kapal "Shema" [2011] 3 CLJ 184 HC ***(refd)***

Kong Ming Bank Berhad v. Sim Siok Eng [1982] 1 LNS 12 PC ***(refd)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***

St Louis Pillay v. AS Nadasan [1914] 1 FMSLR 157 ***(refd)***

Tindok Besar Esate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 90A, 101

For the plaintiff - Albert Tang; M/s Chew, Jugah, Wan Ullok & Co
For the defendant - Paul Tang; M/s Tan Yap & Tang Advocates

Reported by Ashok Kumar

JUDGMENT

Rhodzariah Bujang JC:

[1] Bank Industri & Teknologi Malaysia Berhad ("Bank Industri") was taken over by Bank Pembangunan Malaysia by virtue of a vesting order dated 27 September 2005 which saw it assuming the rights and interests of the former. One of such rights was the liability of a company Sasacom Sdn Bhd, ("Sasacom") the owner of and builder of ships in respect of which Bank Industri had *vide* an agreement dated 8 August 1997 granted a RM9 million term loan. As security for the said loan, Sasacom created a first preferred mortgage on one of its vessel, "Sasacom I" in favour of Bank Industri. There were other securities, such as a first fixed and floating charges by way of a debenture on all the properties and assets of Sasacom and a corporate guarantee by another company, Perkapalan Mesra Sdn Bhd.

[2] It was agreed by the parties that the term loan was to be paid by way of 120 equal monthly instalments. A demand was made on 13 May 2002 upon the alleged failure of Sasacom to pay the plaintiff the principal loan amount and their failure to respond to the demand led Bank Industri to file an admiralty action for the balance outstanding under the loan which stood at RM5,319,483.08 as at 13 August 2002, excluding interests and late charges. This action was filed on 30 September 2002. Pursuant to this action, the vessel mortgaged to the Bank " Sasacom I" was arrested but subsequently, before it could be sold, the vessel sunk.

[3] A year and a half before the filing of this admiralty action, Bank Industri granted to Sasacom another loan - this time a Revolving Bridging loan for a maximum aggregate principal sum of RM14 million. The purpose of this loan is to part-finance the construction of six units of patrol boats by the defendant for an Iraqi company, Al-Naser Al-Adheem State Company (" NASCO") stated to be USD8.850 million. A facility agreement dated 9 February 2001 was executed by the parties for that purpose. By cl. 4.4 of the said agreements, repayment of the loan was by way of progressive deductions from the sales proceeds of these boats. It was agreed between Sasacom and the said Iraqi company that payment for the construction of the patrol boats was by way of a letter of credit issued by National Bank of Jordon to Dr Sabri Yakou as the applicant and Worldwide Management Resources Sdn Bhd ("Worldwide") as the beneficiary. Worldwide in turn has executed a deed of assignment in favour of the Bank in this case and the sales proceeds assignment, which was another security for the revolving bridging loan, was where Sasacom agreed for the sales proceeds to be used to pay for the said loan.

[4] By the same cl. 4.4 it was also agreed that the loan was payable upon demand by the bank. On an alleged default of the agreements by Sasacom, such a demand was made on 31 May 2002 and when again it was not met, the bank filed a writ of summons on 30 August 2008 for the sum of RM10,326,243.67 as at 30 April 2008, with interest and costs. This action was filed under Bank Pembangunan Malaysia Berhad's name.

[5] In their defence to both actions, Sasacom referred to the assignment agreement dated 9 February 2001 in which they had assigned to the bank all their rights, interests and benefits in the sales proceeds from the building of patrol boats from the Iraqi company and the letter of credit issued by the National Bank of Jordon to the bank. They pleaded that this assignment were not just for the two loans they had with the bank but also in respect of loan granted to their sister company, Perkapalan Mesra Sdn Bhd.

[6] Sasacom contended that the bank had failed to take into account the payments assigned to them mentioned earlier and infact the bank had been overpaid and owed them RM6,116,714.58. Thus, Sasacom counterclaimed for that amount and for damages for the loss of use of their submerged vessel. In the suit action, Sasacom also pleaded for the plaintiff to render full account of all the sales proceed from the Iraqi contract and those payments made under the assigned letter of credit issued by the National Bank of Jordon.

[7] I would not be off the mark if I were to say that, from the cross-examination of the plaintiff's witnesses and evidence of their own witnesses as well as their counsel's written submission, the crux of the defendant's defence in these two action lies in their allegation that the plaintiff has failed to show proper accounting of the sum claimed in these two cases. They have rubbished the statement of accounts produced by the plaintiff through Mr Nasrul Asni bin Muhammad Daim - one of their two witnesses at the consolidated trial of these two actions and I would do well to start my considerations of the evidence by giving my views on this issue, his evidence and counsels' submissions on it.

The Credibility Of The Plaintiff's Account

[8] Mr Nasrul Asni bin Muhammad Daim in his witness statement testified that at that material time he was handling the accounts in this case and mentioned also the term loan of RM8.7 million which the bank had granted to Perkapalan Mesra Sdn Bhd.

[9] In respect of the revolving bridging loan of RM14 million and bank guarantee facility of RM1,681,500, which was payable by way of sale proceeds for the construction of the six patrol boats by NASCO, the repayments were as stated in cl. 1 and sch. 4 of the facility agreement.

[10] However, he claimed the bank only received USD4,145,812.89 or RM15,749,411.29 in two payments ie, RM4,635,448.17 on 8 May 2001 and RM11,113,963.12 on 28 August 2001 as evidenced by documents exhibited at pp. 143, 173 and 174 of plaintiff's bundle of documents but not USD8,344,612.89 as alleged by the defendant. These two payments however were utilized to pay not just the revolving bridging loan but the term loan, the loan of Perkapalan Mesra Sdn Bhd and, at the request of Sasacom, also to Worldwide. The detailed breakdown of the utilization of these payments appear at questions and answers 23 and 26 of Mr Nasrul Asni bin Muhammad Daim's witness statement.

[11] In support of their claims in these cases, the plaintiff through Mr Nasrul Asni bin Muhammad Daim produced two sets of statements of accounts for each of the term loan, revolving bridging loan and Perkapalan Mesra Sdn Bhd's term loan. One set was a computer generated statements of account (Tab A to Ex. F) and the other set was prepared using Excel format (Tab J to Ex. E). Sasacom, in the evidence of its witness, Mr Kiu Chiong Ming and in the submission of their counsel were highly critical of the accuracy of these accounts even accusing the plaintiff of manipulating the data in order to get the figures claimed by them in this case. Mr Paul Tang, for the defendant, actually devoted close to 32 pages of his written submission to show examples of the inconsistencies in the statement of accounts and the alleged fiddling of the accounts. As an example, an entry made in Tab A on 21 March 2004 of the sum of RM12,784, entered as " for other miscellaneous payment" was explained in Mr Nasrul Asni bin Muhammad Daim's evidence as " legal fees". However, the defendant contended that on the said date there was no legal action taken by the plaintiff on the revolving bridging loan yet.

[12] Another anomaly in the account pointed out by the defendant is the entry which shows interest being charged at RM25,747.21 on 31 December 2001 appearing in Tab J and subsequently no other amount of interest charged was shown but in Tab A interest is shown to be continuously charged until 30 September 2008 although Tab A is produced much later than Tab J. Mr Paul Tang said this is even more strange when viewed against the evidence of Mr Nasrul Asni bin Muhammad Daim who said that the excel format statement of accounts Tab J were manually prepared from the computer-generated statement of accounts. All these inconsistencies, if I may just conclude, as said

Mr Paul Tang, renders the statements of accounts unreliable and the plaintiff's claim ought to be dismissed. The above are just two examples I picked from the argument of the defendant on this issue. I do not see any need to dwell more on the nit-picking by the defendant on this issue for this reason. Mr Albert Tang in his written submission has suggested a way to save his client out of the entanglement posed by this issue. His suggestion was premised on the letter dated 6 September 2002 (p. 4 of the plaintiff's supplementary bundle of documents) signed by Mr Kiu Chiong Ming using the Perkapalan Mesra Sdn Bhd's letterhead in which he stated as follows:

> Telephone conversation with Nasrul refer.
>
> Thank you for your support. Now that accounts have been sorted out between your Bank and our accountant, we shall proceed to clear all the outstanding within the next 3 months, with the understanding of course, that you will lift/release the Admiralty in Rem No. 27-02-2002-II once we settle the account.
>
> Our first payment of RM300,000.00 for Sasacom S/B's Term Loan will be sent to you next week.

This letter, according to Mr Albert Tang was written in response to a letter from Mr Nasrul Asni bin Muhammad Daim dated 29 August 2002 (Tab 33 of exh. P5) in which Mr Nasrul Asni bin Muhammad Daim gave the amount outstanding as at 31 August 2001 for both Sasacom's term loan and revolving bridging loan and Perkapalan Mesra Sdn Bhd's term loan, with particulars such as the principal owing, the interest and other charges.

[13] Mr Nasrul Asni bin Muhammad Daim, in his evidence said that the RM300,000 was received by them the following week *vide* Perkapalan Mesra Sdn Bhd's letter (p. 277 of plaintiff's bundle of documents encl. 209) instructing them to use the said sum to pay RM300,000 but towards Perkapalan Mesra Sdn Bhd's loan.

[14] Based on the defendant's own admission that the accounts had been sorted out between them as at the date of that letter ie, 6 September 2002, Mr Albert Tang invited the court to consider entering judgment in the admiralty action for the sum of RM4,487,572.54. That figure is arrived at by deducting the payments received (as shown in "N2") amounting to RM987,388.16 from RM5,474,960.70, the amount stated as owing in Mr Nasrul Asni bin Muhammad Daim's letter dated 29 August 2002 (Tab 33 of exh. P5). As for the suit action, Mr Albert Tang asked that judgment be entered in the sum of RM7,604,417.11, after deducting the payments shown in "N2" from the figure of RM7,834,529 stated in the same letter of Mr Nasrul Asni bin Muhammad Daim.

A **What Is "N2"?**

[15] "N2" is an attachment to Mr Nasrul Asni bin Muhammad Daim's witness statement where he tabulated the payments and apportionments of payments received from the defendant to the two loans of Sascom and one of Perkapalan Mesra Sdn Bhd.

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[16] There were seven payments altogether totalling RM2.1 million and in this statement, Mr Nasrul Asni bin Muhammad Daim showed how much of each payment were apportioned for the defendant's term loan, revolving bridging loan and Perkapalan Mesra Sdn Bhd's term loan. It C shows that RM2,024,312.38 was paid for the term loan, RM230,111.89 for the revolving bridging loan and RM1,806,528.71 for Perkapalan Mesra Sdn Bhd's term loan. In respect of Perkapalan Mesra Sdn Bhd's loan, I had omitted to mention earlier and I do so now that the loan has been fully settled and not in dispute.

D **The Question Of Interest And Penalty Interest**

[17] The defendants have also similarly questioned the accuracy of these interests charged in the statements of accounts. For instance, and I repeat, Tab J showed interest of RM25,747.21 which was charged on E 31 December 2001 and that was the last entry for interest in the statement of account but in Tab A, interest was shown to be continuously charged. Mr Albert Tang also has a proposal on the interest and penalty interest should I agree with his earlier proposals on the judgment sums to be entered. Since it was not disputed that the F facility agreement provided for contractual interest of 4% per annum and penalty interest of 2% per annum, he said the interest at 6% per annum should be charged from 1 September 2002 until date of judgment and therefafter at 8% per annum until full settlement in both actions. Though he did not say why the starting date is 1 September 2002, it must be because Mr Nasrul Asni bin Muhammad Daim's letter mentioned above G gave the account as at 31 August 2002.

[18] Mr Paul Tang in his written submission urged me not to interpret Mr Kiu Chiong Ming's said letter about the accounts being sorted out as if it was a reply to Mr Nasrul Asni bin Muhammad Daim's letter H detailing the amount outstanding in the three loans as at 31 August 2002. He submitted that the said letter of Mr Kiu Chiong Ming was infact written after he negotiated for the release of the vessels, Mesra 128 and Sasacom I. He pointed out that infact Mr Nasrul Asni bin Muhammad Daim's letter was in response to one, Ms Ang, the I defendant's accountant asking Mr Nasrul Asni bin Muhammad Daim to "verify all the figures" in order for them to update their record (that letter is at Tab 32 of exh. P5) and dated 18 February 2002.

[19] I am not at all in doubt that as he submitted (and admitted by Mr Albert Tang in his written submission) that indeed Mr Nasrul Asni bin Muhammad Daim's said letter was made in response to Ms Ang's query on the accounts and I am certain that when Mr Kiu Chiong Ming wrote that letter of his on the accounts all being sorted out, he was also fully aware of Mr Nasrul Asni bin Muhammad Daim's said letter and the status of all three accounts as at 31 August 2002. I said that because in his letter he clearly referred to the accounts being sorted out between the bank "and our accountant". In all probability, that sorting out of the accounts with the defendant's accountant cannot have been anything else or with anybody else other than the query posed by Ms Ang. Even if that letter of his was not directly in reply to Mr Nasrul Asni bin Muhammad Daim's letter, it is to me connected to it and the fact remains that straight from the horse's mouth, so to speak, Sasacom through Mr Kiu Chiong Ming was happy with the state of the accounts when he wrote his letter dated 6 September 2002.

[20] Therefore, eventhough the defendant has raised such hue and cry over the correctness of the statements of accounts tendered at the trial, the fact is the plaintiff was not totally in a pit which they could not get out of. Their lifeline is that earlier statement of the account which had been supplied to the defendant and which they acknowledged, though not directly, to be correct. Thus, I am persuaded that the said letter of Mr Nasrul Asni bin Muhammad Daim can form the basis of the judgment sums in these two actions.

[21] I also have another reason to accept the proposal of Mr Albert Tang on this issue. It is that the defendant was not able, despite testimony to the contrary by Mr Kiu Chiong Ming and that letter of Ms Ang mentioned earlier, to show any documentary evidence that they have objected to the correctness of the accounts, (not the particular statements of accounts tendered at the trial, I hasten to add), bearing in mind that the accounts here are not just in the thousands but in millions. Mr Kiu Chiong Ming admitted in his evidence that he did not complain about these accounts in his cross-examination and that he left it to his accountant to sort out the statement of account which he said they had received from the plaintiff. He could not however remember the accountant's full name though she worked with him for five - six years and has since left their employment. To challenge the accuracy of the accounts is obviously their right but to keep silent for so long and then quibble about them in righteous indignation at the trial is not genuine conduct, in my opinion. Speaking of conduct, the plaintiff's conduct in this matter is not entirely unblemished. They gave the statement of accounts to the defendant which they wanted to use at trial

just before the commencement of the trial and had it not been for that letter of Mr Nasrul Asni bin Muhammad Daim, I would have been justified to accede to the defendant's demand that these two actions be dismissed.

[22] Coming back to the proposal of Mr Albert Tang in deducting the payments shown in "N2", I have no problem in following that suggestion - that to me is fair but the thorny issue here is there is a payment of RM250,000 shown in "N2" which the defendant alleged was not accounted for as payments for the two loans. Mr Kiu Chiong Ming in his cross-examination agreed that he had no proof - no bank statement to show that RM250,000 has been cleared and debited against the drawer's account. Bearing in mind that the particulars of payment shown in "N2" was the result of further and better particulars supplied by the defendant at the plaintiff's request prior to the trial and the detail of that last unaccounted for payment was one of such particulars, therefore, by the defendant's own failure to prove or show that they have made this payment, their complaint that it was not accounted for by the plaintiff is unjustified. In other words, the onus is on them to prove that payment was made and not the other way round. I dare to say this because of s. 101 of the Evidence Act 1950 and the Federal Court's decision in *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116; [1970] 1 MLJ 145. At p. 179 of the said report Azmi LP explained the underlying principle behind that section as follows:

> Viscount Maugham in *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd The Kingswood* [1941] 2 All ER 165 dealing with the question of burden of proof in that case says this:
>
> > Agreeing with the trial judge, I think the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat non ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense, and it should not be departed from without strong reasons.
>
> That rule means "the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof.

[23] Having made that decision and with the backing of these authorities, I am now confident of accepting the proposal made by Mr Albert Tang regarding the amount to be entered as the judgment sums in these two actions but which orders I would only make after dealing with three issues raised in the defence and counterclaim of the defendant. Those issues are overpayment, the sinking of Sasacom I and the defence of limitation raised in the suit action.

Overpayment

[24] To recapitulate, the defendant alleges in their defence and counterclaim that in fact the plaintiff has been overpaid from the assignment to them of the proceeds of sale by the defendant in respect of the building of the six patrol boats and the bank owed them RM6,116,714.58 and counterclaimed for that amount. In their counsel's submission that amount of overpayment was stated as RM5.1 million. Be that as it may, there are two components to this issue. The first is whether the plaintiff had been paid the first 30% of the sales proceeds from the boats and secondly, whether the six boats had been completed and payment made in respect of them.

The first 30%

[25] In the bank's letter of offer for the revolving bridging loan (Tab 9 of exh. P5), under cl. 14 titled "repayment" it is stated as follows:

> The facility is repayable on demand. Unless and until demand is made by the Bank the principal repayment shall be made upon receipt of the balance of the sale proceeds received from NASCO in respect of the Assignment of Sales Proceeds (Letter of Credit) as tabled below:-
>
> 2nd payment for USD2,212,500.00 only
> 3rd payment for USD2,212,500.00 only
> 4th payment for USD442,500.00 only
> 5th payment for USD1,327,500.00 only.

In sch. 4 to the facility agreement (Tab 10 of exh. P5) the schedule of payments stated above are as follows:

> 1st payment - **paid to the defendant before the revolving bridging loan was given**. (emphasis added).
>
> 2nd payment - USD2,212,500
>
> 3rd payment - USD2,212,500
>
> 4th payment - USD 442,500
>
> 5th payment - USD1,327,500
> USD6,195,000

[26] It is clearly obvious from the letter of offer which the defendant did not dispute, there was no reference made to the first payment of 30% under the letter of credit which amounts to USD2,655,000. Why is this so? The explanation lies in Mr Kiu Chiong Ming's own letter of

application for the loan dated 16 October 2000 (Tab 8 of exh. P5) in which he detailed the "Total contract sum outstanding" under the letter of credit as follows:

1st delivery	- 30%	paid
2nd delivery	- 25%	2,212,500
3rd delivery	- 25%	2,212,500
4th delivery	- 5%	4,425,000
5th delivery	- 15%	1,327,500
	70%	USD6,195,000

For Mr Kiu Chiong Ming to now come to court, denying what is in his own application letter and alleging that in fact the bank had received the first payment of 30% in the face of such clear documentary evidence made under his own hand, again raises the issue of the genuineness of this allegation in the first place. What is more, the facility agreement he signed on behalf of the defendant, in no uncertain terms states that the first 30% has been paid. What justification would I have not to give effect to such express declaration given under Mr Kiu Chiong Ming's own hand? None.

[27] What then of the other remaining payments which form the crux of the second component to this issue? The defendant contended that the six patrol boats have been completed and the plaintiff had received all the payments due to them under the letter of credit. The plaintiff, through the evidence of Mr Nasrul Asni bin Muhammad Daim said they only received USD4,145,812.89 (not USD6,195,000) in two instalments. Though I have stated the details of the payments earlier, they bear repeating for easier understanding of the issue now. The first was received on 8.5.2001 ie, USD1,220,221.89 (or its equivalent - RM4,635,448.17) and the second on 28 August 2001 ie, USD713,111 and USD2,212,480 (or its equivalent - RM11,113,963.12).

[28] Proof of these payments were evidenced by the documents at pp. 143, 144 and 173 and 174 of the plaintiff's bundle of documents marked 'C' said Mr Nasrul Asni bin Muhammad Daim in his evidence. Page 143 is a telex from HSBC Bank and p. 144 is the telegraphic transfer of the said sum of RM4,635,448.17. Page 173 and p. 174 is a telex message from Jordon National Bank for the said two sums indicated above totalling RM11,113,963.12. I had no qualms in relying on these two documents as evidence of the two payments since there was no dispute by the defendant that these payments have been

received; their allegation being that only much more than that were received. In other words, proof of these two payments were not in issue. What of course is in issue are payments of the remaining sum under the letter of credit.

[29] Now, as proof of that, the defendant exhibited an email dated 26 November 2008 from one Abdullah Bahjat Hasan, (exh D4) who bore the designation of Director-General of Heavy Engineering Equipment Co, Ministry of Industry & Minerals, Bhagdad/Iraq addressed to Mr Kiu Chiong Ming in which he said they have a letter from Jordon National Bank dated 29 November 2002 which shows that the defendant had received "2,172,460$".

[30] First, I must say that reliance on the email without the maker being called is highly undesirable given that, with due respect to the defendant, the technology of electronic mail can be manipulated though I must hasten to add, there is no such proof of that here. Secondly, the email spoke about the letter from the bank of Jordon as the basis for saying that those payments were effected. That letter from the bank of Jordan is not exhibited or produced at the trial. So infact, what the writer of the email said about the receipt of the payments was not direct evidence of his own knowledge but based on what was stated in another document. That is clearly hearsay to me and shows the unreliability of that document as proof that full payments have been made. I am entitled therefore not to attach any weight to that document. The best evidence rule - that the maker of the document should be called to prove its content should be strictly enforced in this case for proof of an assertion as important as what Sasacom is making and given the absence of other corroborating evidence on the other payments.

[31] Sasacom complained that they were kept in the dark about payments from NASCO because the plaintiff dealt directly with Dr Sabri Yakou. Even if it was true that the Bank dealt directly with Dr Sabri Yakou, the evidence shows that Sasacom themselves were unable to prove that the contract for the six boats had been successfully completed, in order for full payments to be effected. Mr Paul Tang in his written submission said the plaintiff should have called witnesses to prove that the payments were not made. That submission cannot be right for these reasons.

[32] Firstly, it is the defendant's defence that there was overpayment but the plaintiff said there was none. The defendant must prove the full payment or rather overpayment because not being paid, being a negative fact is incapable of proof. I have said this earlier when I quoted s. 101 of the Evidence Act 1950 and excerpts from the judgment of the Federal Court in *Nanyang*'s case *(supra)*.

[33] Secondly, Mr Kiu Chiong Ming himself admitted that he wrote a letter dated 16 April 2004 at p. 299 of exh. D1 (the defendant's bundle of documents admitted as to authenticity) that he submitted a proposal to the plaintiff on 29 March 2004 to repay the two outstanding loan facilities of Sasacom. Thus, even at that date, he knew that the loans were not fully paid for and by that date, the admiralty action was already filed in court and the letter of demand for the revolving bridging loan (dated 31 May 2002) had also been received by them.

[34] Thirdly, as highlighted to me by Mr Albert Tang, under cl. 3 of the sales proceeds assignment (Tab 12 of exh. P5) executed by the bank and Worldwide it was agreed that the Bank was not obliged to make any enquiry as to the nature and sufficiency of payment under the letter of credit and that Worldwide, the assignor remained liable for all obligations that needs to be performed under the letter of credit. The stringent requirements for the submission of documents before release of payment under the letter of credit is an entrenched principle in banking law, said Mr Albert Tang and to which, I agree.

[35] As for the completion of the patrol boats, I choose not to dwell lengthily on the issue after what I have said above as it is merely a side issue to the defence of overpayment. Suffice for me to say that the defendant's tendering of exh. D6, a letter from Mr TG Lim (project manager) dated 3 July 2001 addressed to General Fauzi Al-Shawi confirming the handover of the six patrol boats and acknowledged (according to the letter) by the said General does not carry much weight because of these facts.

(1) The maker of that letter and the General were not witnesses at this trial.

(2) Mr Kiu Chiong Ming's own letter dated 30 January 2002 (at p. 218 of bundle C which he admitted writing) shows that progress of their work were affected by the September 11 incident (in America) and they were finalizing the extension of the letter of credit because of the delays. In the same letter he promised to clear all outstanding payments with the plaintiff in February.

[36] Then by his letter dated 6 April 2002, less than three months after that (Tab 29 of exh. P5) he demanded the renewal of the letter of credit from Dr Sabri Yakou. Mr Albert Tang has submitted and I agree with him that if the six patrol boats had been completed as he alleged, there was no necessity to renew the letter of credit and the undisputed fact is the letter of credit was never renewed.

[37] The bottom line is, the defendant's allegation that there was full and/or overpayment of the two loans have not been substantiated. On the contrary, it has been demonstrated quite credibly that Mr Kiu Chiong Ming's testimony in court clashed with contemporaneous documentary evidence. The Supreme Court in *Tindok Besar Esate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119 advised the testing of a witness oral evidence with that of contemporaneous documents and to draw reasonable inferences from these evidence, whether to believe the witness's subsequent recollection or version of it, particularly if he is a witness's with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Chang Min Tat LJ in the said case said:

> Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[38] In the context of this case, other than demonstrating the contradictions in the defendant's witness evidence and the relevant documents as I had done, what strengthens my conviction that the defendant's defence of overpayment is devoid of merit is that these alleged overpayments are not some minute amount. They are in the millions and it defies logic and common sense that a company such as the defendant's which was conducting business overseas would keep quiet about it until they were sued in these actions. That attitude in itself renders their said defence more of an afterthought rather than a genuine one.

[39] Next, I will now deal with the defence of limitation under the suit action.

Defence Of Limitation

[40] There is no dispute that the limitation period in this case was six years (see item 40 read with item 94 and the decision of the Privy Council in *Kong Ming Bank Berhad v. Sim Siok Eng* [1982] 1 LNS 12). Mr Paul Tang submitted time should run from the date of the payment (made under the Iraqi's contract) ie, 28 August 2001 which was not disputed by the plaintiff and therefore it should end on 28 August 2007. However, the suit action was only instituted on 30 April 2008. It is, therefore, statute barred.

[41] Mr Albert Tang in answer replied that time should only run from the date of the last payment tendered which was on 16 May 2004, the payment by cheque of RM250,000 which was given by way of a covering letter using the Perkapalan Mesra Sdn Bhd's letterhead of the same date at p. 299 of exh. D1 - the defendant's own exhibit. In that

letter it was stated that the plaintiff could only bank in the cheque upon approval of their proposal scheme (to settle the loans). The plaintiff replied in their letter dated 22 April 2004 (Tab 39 of exh. P5) that they would only consider the proposal made if they be allowed to bank in the cheque. Perkapalan Mesra Sdn Bhd's reply, to say that being the parent company for Sasacom, it needed the board's approval, is at Tab 40 of exh. P5.

[42] Finally, on 17 May 2004, the defendant agreed that the payment be utilized and it was apportioned as follows according to Mr Nasrul Asni bin Muhammad Daim: RM150,000 for the revolving bridging loan and RM100,000 for the term loan.

[43] Mr Paul Tang submitted that this payment was an afterthought intended to circumvent the limitation period and he said this because firstly, the affidavit evidence of Mr Narayanam Achuthan Nair, Vice President/Head of Plaintiff's Legal Department and Mr Nasrul Asni bin Muhammad Daim were contradictory on this payment.

The Affidavit Evidence

[44] Mr Narayanam Achuthan Nair in his affidavit filed in this suit action (encl. 23) deposed that out of the RM250,000, a sum of RM137,216 was apportioned for the revolving bridging loan and the balance for the term loan facility. Mr Nasrul Asni bin Muhammad Daim's evidence on the apportionment I have stated above. Secondly, Mr Paul Tang pointed out that Mr Nasrul Asni bin Muhammad Daim's evidence on this payment is also contradictory in that he said that of RM150,000 paid for the revolving bridging loan, RM137,216 was used to pay the principal and RM12,784 for legal fees. But, said Mr Paul Tang in Tab A of the bundle F, this sum of RM12,784 was listed as payment for 'other miscellaneous' which Mr Nasrul Asni bin Muhammad Daim said in cross-examination "can mean interest portion". In re-examination however he clarified that RM12,784 was for legal fees. This, said Mr Paul Tang cannot be true because when that entry was made, in 2004 there was no legal action yet instituted. Further, he also questioned the fact that in the statement of accounts (bundle C pp. 241 - 275, Tab K of bundle E and pp. 294 to 296 of bundle C) did not have the entry to show payment of RM100,000 was made for the term loan.

[45] In resolving this dispute I must first of all state after examining the evidence of Mr Narayanam Achuthan Nair and Mr Nasrul Asni bin Muhammad Daim that there was in actual fact no discrepancy even if, at first blush, the figures stated by them were different. As I have highlighted above both testified on the same amount as payment of the principal sum under the revolving bridging loan but Mr Nasrul Asni bin

Muhammad Daim mentioned also the legal fees which when added up with the payment apportioned for the principal sum, became RM150,000. The so called 'discrepancy' is actually explained. Additionally, the points not in his client's favour are these:

(i) The cheque in question was definitely tendered in payment of the two loans as is clearly stated in the heading of the letter enclosing the cheque,

> Loan Facilities - SASACOM S/B.

(ii) This cheque was not a conjecture of the plaintiff because the particulars of it was given by the defendant themselves to the plaintiff when the latter asked for further and better particulars at the pleading stage. They are therefore estopped by these two facts to deny that there was infact payment made by them on the said date for the two loans, whatever may be the amount or the proportion.

(iii) The plaintiff is contractually allowed under cls. 20.0 and 21.0 of the facility agreement for the revolving bridging loan to apportion payments received into either the term loan or the revolving bridging loan.

Clause 20.0 reads:

> Application Of Moneys
>
> If any sum paid or recovered in respect of the liabilities of the Borrower under this Agreement or any other Facility Document is less than the amount then due, the Lender may apply that sum to principal, interest, fees or any other amount due under this Agreement or any other Facility Document in such proportions and order and generally in such manner as the Lender shall determine.

Clause 21.1 reads:

> Appropriation
>
> All moneys received by the Lender pursuant to this Agreement or any other Facility Document may be applied by the Lender in its sole absolute discretion towards payment or repayment or prepayment or to be appropriated in any manner deemed fit by the Lender.

Mr Paul Tang said in order to apply cl. 20.0, the plaintiff must prove that the sum received by the plaintiff in payment is less than the amount then due and this, he said they have not proved. I would, respectfully beg to differ. The liabilities of the defendant even as at 31 August 2002 was already in the millions and that is definitely much more than the RM250,000 payment.

[46] Thus, on the above grounds, I am of the view that the defence of limitation fails.

[47] Last but not least, I will consider the defendant's counterclaim for damages on the sinking of Sasacom I.

The Sinking Of Sasacom I

[48] The defendant alleged in para. 23 of its counterclaim that the plaintiff did not pay the court Sheriff all the expenses of the maintenance for Sasacom I and it had not been properly maintained from the day of its arrest.

[49] In his written submission, Mr Paul Tang contended that the plaintiff was negligent in not maintaining the vessel Sasacom I after its arrest, causing it to sink. They knew that the vessel was in poor condition and did nothing to preserve the condition of the vessel. The bank also failed to take an omnibus order to *inter alia*, preserve the vessel, its machinery and equipment.

The Omnibus Order

[50] The omnibus order can be sought either by the plaintiff or by the Sheriff and the plaintiff may as decided in the *Kertih Port Sdn Bhd v Pemunya Kapal "Shema"* [2011] 3 CLJ 184 be ordered to pay the expenses incurred during the arrest.

[51] Mr Paul Tang submitted that the Sheriff in this case should not bear the burden of maintaining the ship and that the plaintiff's nonchalant attitude - knowing the poor condition of the ship but yet doing nothing about it even after it had submerged, made them liable for its sinking.

[52] Mr Albert Tang in reply submitted that the allegation made in the defendant's counterclaim that the plaintiff failed to pay the Court Sheriff for all the expenses of the maintenance of the vessel does not found an action in law. The plaintiff, he said, can only be liable in law to the defendant for wrongful arrest but that too only in situation of *mala fides* or *crassa neglentia*, citing the case of *"The Evangelismos"* [1858] 12 Moo PC 352. The plaintiff, he further submitted was not in the position of a bailee of any kind and has no legal custody of the res under arrest so how could there be any form of duty in law to maintain the ship?

[53] In resolving this issue, I am bound to give importance to one important fact peculiar to this case only. It is that after its arrest, the vessel remained in the custody of the defendant, right down to the time of its sinking. This is not only in the evidence of the plaintiff's witness, Mr Abdul Karim bin Ismail who was head of the plaintiff's Maritime, Business Development & Advisory Division who inspected the vessel twice at the defendant's premises before its sinking and took photographs of it as well but also in the clear admission made by Mr Kiu Chiong Ming himself in cross-examination. Thus, whether at the interlocutory stage, a different stand was adopted by the plaintiff does not matter. The defendant's own evidence in the trial is definitive enough for me to consider.

The Photographs

[54] I need to digress at this point to mention the photographs which were taken by digital camera and a certificate under s. 90A of the Evidence Act 1950 was tendered. Due to the objection raised by the defendant during the trial, I marked these photographs only for identification and promised to rule on their admissibility later. Mr Paul Tang made no issue out of these photographs in his written submission and I infer from it that it may be too trivial for him to raise at the close of his client's case. Nonetheless, it is only right that I make known my view, that there is sufficient compliance with the Evidence Act 1950 on the production of these photographs and I agree that they be marked as plaintiff's exhibits.

[55] Why I say so is this. A digital camera to me comes within a definition of 'computer' in the Evidence Act 1950 as it is a device that 'records' and the photographs printed after being transferred to a proper computer is a document within the meaning ascribed to it in the Evidence Act 1950. The photographs show the poor condition of the vessel before its sinking - not really a surprise for if it were in good condition it would not have sunk.

[56] Coming back to the sinking of Sasacom I, Mr Paul Tang cited the case of *St Louis Pillay v. AS Nadasan* [1914] 1 FMSLR 157 where the Sheriff was sued for failing to employ proper guards resulting in the loss of cattle and *'The Nagasaki Spirit'; Owners of Cargo Lately Laden on Board the Ship or Vessel 'Ocean Blessing' v. Owners of the Ship or Vessel 'Nagasaki Spirit'* [1994] 2 SLR 621 in which the court ordered that the Sheriff bore the expenses which was not even authorized by him. He said therefore, the Sheriff does not bear the exclusive liability over the arrested ships.

[57] Now, it appears from my reading of these authorities that the Sheriff is the man who bears the responsibility of ensuring that the vessel arrested is safe and properly maintained. That is why the application for the omnibus order is to be made on his behalf by the plaintiff or other persons interested in the vessel. I would think that the 'other persons' here also refers to the defendant as owner of the vessel. It must be remembered that cost and expenses incurred by the Sheriff in the maintenance and custody of the vessel rank as "Sheriff expenses" and to be paid out from the sale proceeds of the ship or borne by the arresting party, directly or by way of reimbursement to the Sheriff (para. 10.127 of *Halsbury Laws of Malaysia* Vol. 1(1) Reissue).

[58] I agree with Mr Albert Tang that there is neither an obligation in contract nor in tort for the plaintiff to maintain the ship and by the provisions on the application for an omnibus order mentioned above, the legal obligation to maintain the ship rests not solely with the plaintiff but with others who are interested in the vessel. It is in other words and in my view a joint obligation, not exclusive to the plaintiff only as submitted by Mr Paul Tang. Contrary to what he had submitted, his client also bore that obligation especially so in this case when the deterioration of the vessel happened before their very eyes and in their own backyard or rather shipyard.

[59] The defendant was not in the circumstances, restrained from or was helpless in taking action themselves to preserve and maintain the vessel. Since in law that obligation to maintain rests not solely with the plaintiff and more importantly, the vessel not being in their physical custody, I could not assign the blame for its sinking to the plaintiff. For these reasons, the defendant's counterclaim is dismissed.

[60] If I were wrong in that conclusion, then my alternative view is that the plaintiff is only 30% liable for the sinking of the vessel and should pay damages in that proportion. As for damages, my opinion is that the value of Sasacom I at the time of its arrest should be a fair compensation for its loss. However, that opinion is merely *obiter dictum* as my main decision is no liability should be attached to the plaintiff on this issue.

[61] In conclusion, I would summarize my decision as follows:

(1) For the admiralty action, judgment is entered in the sum of RM4,487,572.54 with interest at 6% per annum from 1 September 2002 until date of judgment and thereafter at 8% per annum until full settlement.

(2) For the suit action, judgment is entered in the sum of RM7,704,417.11 with interest at 6% per annum from 17 April 2004 until date of judgment and thereafter at 8% per annum until full settlement.

(3) The defendant's counterclaim in both actions are dismissed.

(4) The defendant is to pay cost to the plaintiff in respect of the allowing of the plaintiff's claim in the two actions and the dismissal of their counterclaim, which cost is to be taxed unless agreed. If not agreed, I would cap getting up at RM80,000.